

GIMPA LAW & ETHICS POLICY PAPER

INTERNATIONAL TRADE AND INVESTMENT RELATIONS AFTER THE PANDEMIC: AFRICA RISING?

Executive Summary

On Wednesday, 27th May 2020, Dr Alex Ansong, Senior Lecturer and Head of Public Law Department at the GIMPA Faculty of Law, delivered via Zoom, the fourth edition of the GIMPA Law and Ethics Web series on the theme: *International Trade and Investment Relations after the Pandemic: Africa Rising?* This session was moderated by Professor Richard Frimpong Oppong, Associate Professor, Faculty of Law, Thompson Rivers University, Canada.

The outbreak of the coronavirus has reiterated the need for the economic integration of Africa. The best means to achieve this is through the African Continental Free Trade Area (AfCFTA) Agreement, which aims to advance Africa's interests through intra-African trade.

Although negotiations regarding the AfCFTA has concluded, it is recommended that Member States engage and educate their various domestic constituents before implementation. One of the advantages that COVID-19 has brought is that it is likely to delay the implementation stage of the Agreement, giving African States more time to engage and plan.

That notwithstanding, the impact of COVID-19 on International Trade and Investment Relations has exposed the economic vulnerabilities of the African continent, and the importance of building domestic competence by supporting domestic industries. This will enable domestic industries to compete with foreign industries, and strategically position the African continent as a force in global trade.

In the post COVID-19 era, a smooth commencement of the AfCFTA Agreement will be critical to the hope of 'Africa Rising' i.e. the hope of tangible economic benefits for the peoples of the African continent, reflected in their day to day lives.



I. Introduction

The African Continental Free Trade Area (AfCFTA) Agreement was negotiated by the African Union (AU) and signed by 44 of the 55 Member States of the AU on 21st March 2018 in Kigali, Rwanda. The aim of this Agreement is to accelerate intra-African trade and boost Africa's trading position in the global market by strengthening Africa's common voice and policy space in global trade negotiations. Currently the AfCFTA has 54 signatory States, including 28 States that have ratified it, thus paving the way for its entering into force. The AfCFTA has the potential to become the biggest free trade Agreement outside the World Trade Organization (WTO), in terms of number of country participants and geographical coverage, once it is ratified by all the 54 signatory States. The outbreak of COVID-19 has however impacted International Trade and Investment flows. Countries around the world have not been spared the economic ramifications of this

virus, more so African countries who rely more on external trade, rather than trading internally on the continent. COVID-19 has seemingly forestalled plans to roll out the implementation stage of AfCFTA in July 2020. This Policy Paper suggests that the need for the economic integration of Africa post COVID-19 is now more pronounced than ever. The AfCFTA is the key to achieve this, and further to realize the hope of 'Africa Rising'. Nonetheless, there is the need to engage various domestic constituencies, especially the business community, regarding how the AfCFTA Agreement is implemented and operationalized. The legislative and judicial decision-making arrangements under the AfCFTA Agreement is also of paramount importance in order to ensure the success of intra-African trade. In facilitating the liberalization of trade in goods, tariff and non-tariff barriers should be eliminated. Attention should be paid to trade in services as well, since this has the potential of generating more revenue for Africa.



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II. Impact of COVID-19 on Global and Intra-African Trade

The impact of COVID-19 on Global Trade has been profound, and includes the following:

- Disruptions in global supply chains with the closure of borders and restrictions on movement by most States to combat the spread of the virus;
- Closure of borders may potentially lead to claims by foreign investors for international arbitration. However, the defences of force majeure and necessity under International Law may be available i.e. since the closure of borders etc. were done in the interest of public safety and health, States can claim these defences pursuant to Articles 23 and 25 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, provided that those measures were applied in a non-discriminatory manner to both local and foreign investors; and
- The creation of opportunities for domestic industries i.e. domestic competence has been and is being built, as many companies have begun to diversify their supply chains so as to produce Personal Protective Equipment (PPE), hand sanitizers, protective face masks and other essential supplies.

The impact of COVID-19 on Intra-African Trade has also been profound, including the following:

- Possible delay/postponement of the AfCFTA Agreement from its operational date of 1st July 2020 in order to allow the Member States who have not yet ratified to reflect before doing so. For those that have ratified the Agreement, it will allow them to further engage with domestic stakeholders to educate them on the technicalities of the Agreement before its eventual implementation;
- AfCFTA represents the perfect opportunity for Africa to advance its economic interests through intra-African trade in the post COVID-19 era;
- The implementation of AfCFTA will be a catalyst for the economic recovery of African States with varying economic capacities in the post COVID-19 era i.e. the AfCFTA will create a single market which will provide a huge incentive for domestic industries, and a large market size (1.3 billion people) which will be a magnet for foreign direct investment in Africa; and
- COVID-19 has enhanced the ability to trade seamlessly without face to face interactions, such that digital trade may be the next big thing in, and for Africa.

III. Challenges

- The needed legislative authority for the success of AfCFTA is offset by its rigid consensus decision-making process i.e. every Member State wields a veto power and this makes consensus decision-making virtually impossible;
- The judicial decision-making process under the AfCFTA Agreement is a State vs. State dispute settlement system. This creates room for States to resort to political expediency, instead of an objective commitment to ensure compliance to a rules-based system;
- The important principle of direct effect, which allows private entities to enforce their rights under European Union Law for instance, is absent in the AfCFTA dispute settlement system. This has the tendency of burdening Member States logistically and politically when seeking redress on behalf of its citizens;
- The dispute settlement system under AfCFTA is disappointing as it is a direct replica of the WTO system which has many flaws. This is thus a missed opportunity for Africa to contribute to the development of International Trade Law by coming up with a new model that could have inspired a reform of the WTO system;
- Unnecessary regulatory and administrative hurdles in the African trade system inhibits sector operators from proactively responding to the needs of a particular market. For example, accreditation rules in Ghana prevents Universities from rolling out courses in a timely manner to attract prospective local and foreign students;
- The AfCFTA Agreement was negotiated rapidly, using an elitist instead of a bottom-up approach i.e. the engagement of domestic constituents in negotiating the Agreement was minimal, hence an outcome that is foreign to the private commercial entities that will engage in the trade;
- In the post-COVID-19 era, closure of land borders by African States, may contravene their treaty obligations i.e. border closures are non-tariff barriers likely to become operational impediments to the AfCFTA; and
- The lack of infrastructure (road and railway networks) in Africa may become an impediment to intra-African trade i.e. shipping of goods within Africa is sometimes more difficult than shipping goods externally.



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IV. Policy Recommendations

- The General Legal Council (GLC) in Ghana and regulatory bodies of the legal profession and education in other African countries should provide guidelines to make AfCFTA Law one of the core courses to undertake in order to qualify as a Lawyer. This will build competence across board, enable knowledge of AfCFTA to be widespread, and make intra-African trade valuable;
- In rolling out its COVID-19 stimulus package, and preparing Ghana for the AfCFTA take-off, the Government of Ghana must prioritize the manufacturing sector, as it has the potential to create more jobs, compared to other sectors;
- A substantial reduction and the ultimate elimination of customs duties and/or tariffs among AfCFTA Member States will contribute to increasing intra-African trade by pulling down tariff barriers among African States generally. This will greatly facilitate trade within the global trade regime as well;
- States have a role to play to assist traders to effectively engage in digital trade by ensuring the required training for traders (mostly the women in charge of food distribution), to be abreast with the systems, and likewise engaging them to use mediums such as Mobile Money transfers to enhance their trade. The Ghana Union of Traders Association (GUTA) and other trading associations should also be instrumental in this regard;
- African States need to take trade in services more seriously as it potentially has greater revenue generation capacity in international trade, since COVID-19 has exposed African States', including Ghana's over reliance on traditional exports in the agricultural and extractives industries;
- African States should continue to engage their various domestic constituencies, especially the business community regarding how the AfCFTA Agreement is to be implemented and operationalized;
- Domestic industries in Africa should be proactive in targeting international markets, as the AfCFTA Agreement will open up domestic industries to competition from external ones;
- In order for the domestic industries in Africa to compete in the global market, there is the need for African States to eliminate regulations that restrict these industries; and
- African States must have greater confidence in its academic institutions by doing away with "self-imposed Jurassic age rules" that cause a degenerative backslide. For instance, the general policy that Lecturers at Universities in Ghana must hold a PhD before they can teach is restrictive and demoralizing as a large chunk of readily available human capital is cut off. While making good use of all available human capital, we must also develop our own PhD programmes to reduce capital flight by those who take money out of the local economies to buy education elsewhere.

IV. Conclusion

The clarion call for the economic integration of Africa is ever so meaningful against the backdrop of a world adversely affected by the impact of COVID-19 on International Trade and Investment Relations. While the AfCFTA maintains the promise of enhancing Africa's performance in International Trade and Investment after the pandemic, genuine apprehensions also exist with respect to its viability and success.

Good laws cannot be implemented if the political organs tasked with implementing them are saddled with rigid rules that promote gridlock in the decision-making system. There is therefore the need to review the legislative and judicial decision-making processes under the AfCFTA Agreement, in order not to repeat the past mistakes of the WTO.

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